Central Law Journal

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CONSTITUTIONAL LAW—FEDERAL LABOR BOARD

PENNSYLVANIA R. CO. v. UNITED STATES RAILROAD LABOR BOARD 282 Fed. 693.

The decision in this case printed in the Central Law Journal for December 22, 1922, is one of great importance. Most of the conclusions of the Court in this case seem to us sound, but there is one which will we hope be overruled. This is that the decision of the Labor Board is "only advisory." This seems to be in direct opposition to the positive language of Section 301 of the Transportation Act. The last sentence of this provides "if any dispute is not decided in such conference it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and *decide* such dispute."

The language of 307 is similar. Clause (a) begins: "The Labor Board shall hear, and as soon as practicable and with due diligence *decide,* any dispute involving grievances, rules or working conditions" which the Adjustment Board has failed to decide. The section also provides that if the Adjustment Board is not organized "the Labor Board (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence *decide,* any dispute involving grievances, rules or working conditions which is not decided as provided in Section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of Section 303."

Are there any words in legal vocabulary which have a more established meaning than those used in the sections quoted? "To hear and to *decide.*" These are the words used in conferring jurisdiction upon courts of justice. It might as well be said that the judgment of a court is only advisory. The reason given by the Court in the case under consideration is "there is no provision for the enforcement of the terms of the decisions." But is this a reason? Can it be expected that the act should state the ordinary jurisdiction of Courts of Justice. One branch of this jurisdiction is to enforce by appropriate civil proceedings the decisions of the various tribunals created by law. When violation is threatened these the courts enforce by injunction. In the case of the United States v. Railway Employees (283 Fed. 479, 95 Central Law Journal, 351, Nov. 17, 1922), the District Court for the Northern District of Illinois by injunction restrained railway employees from interfering with interstate commerce. This in effect enforced the decision of the Labor Board.

The Transportation Act is so recent that we cannot expect to find numerous judicial decisions upon the effect of the decision of the Tribunal created by that act. But we do find numerous decisions under the Interstate Commerce Act and under other acts creating tribunals for specific purposes. To these the Court in the case under consideration does not refer, but they seem to be controlling.

The Interstate Commerce Act, Section 12, gives the Commission "authority to inquire into the management of the business of all common carriers subject to the provisions of this Act." Full power to obtain evidence including the production of books

and papers "from any place of the United States" is given to the Commission. Depositions may be taken here or in foreign countries. A full hearing is thus insured and is had.

This statute is a valid exercise of the constitutional power to regulate commerce between the States and gives the Commission full authority to deal with all the matters committed to it by the Act. (Interstate Commerce Commission v. Brimson, 154 U. S. 447; Texas & Pacific R. R. v. I. C. C., 162 U. S. 197.)

The general rule on the subject of the effect of the findings of such a commission is well stated by Mr. Justice Baldwin in Holmes v. Jennison, 14 Peters, 540 (Appendix at p. 628).

"The universal rule that where power is given to any tribunal to be exercised at its discretion, whether it is legislative, executive, judicial or special, the decision of such tribunal is revisable only by some other tribunal, to which a supervisory power is given."

The form in which the decision is pronounced "does not affect the nature or character of the decision."

The same rule is thus stated in 23 Cyc. 1062.

"The rule against collateral impeachment of judicial decisions applies to the determinations of State and County officers or boards of officers, who, although not constituting a court, are called upon to act judicially in matters of administration."

Findings of fact by the Interstate Commerce Commission are binding upon the courts unless shown to be clearly against evidence. (Illinois Central R. R. v. Interstate Comm. Comm., 206 U. S. 441; Cincinnati, etc., R. R. v. The Same, 206 U. S. 142; Louisville & Nashville R. R. v. Behlmer, 175 U. S. 648; The Same v. Interstate Commerce Commission, 184 Fed. 118; Darnell-Taenzer Lumber Co. v. Southern Pacific Ry. Co., 221 Fed. 890; Certiorari Denied, 238 U. S. 629; U. S. v. Louisville & Nashville R. R., 235 U. S. 314, 320.)

We may add (Abilene Cotton Oil Company case, 204 U. S. 426) under Section 16 of the Interstate Commerce Act (Barnes Federal Code, Section 7905), provision is made for bringing suit upon an order made by the Commission for the payment of money to a complainant. This section modified the common law rule in such cases and makes the findings and order of the Commission only prima facie evidence of the facts therein stated. Under this section it is held that in a suit upon the order the report is sufficient evidence and sustains a judgment without the introduction of further testimony. (Meeker v. Lehigh Valley R. R., 236 U. S. 412, 434; Cincinnati, etc., Co. v. I. C. C., 206 U. S. 142; Haddad v. S. P. Co., 185 App. Div. (N. Y.), 500; B. & M. R. R. v. Hooker, 233 U. S. 97.)

To use the language of Francis B. James in introduction to Clark on Interstate Commerce:

> "A new jurisprudence has grown up in America in which right and justice have been sanely, quickly and cheaply meted out through modern administrative tribunals."

It is certainly "a lame and impotent conclusion" that the decision (so described by the act itself) of a Tribunal created by an act of Congress, the members of which are appointed as judges are, "by the President, by and with the advice and consent of the Senate" and having full power to compel the attendance of witnesses and their testimony and the production of books and papers, and the like, should be advisory only. Sections 310 and 311 of the Act give to the Labor Board all the powers of a Court of Justice for the ascertainment of the facts. Section 309 provides: "Any party to any dispute to be considered by an adjustment board or by a Labor Board shall be entitled to a hearing either in person or by counsel." When parties have been heard by counsel, have produced all their evidence and the decision has been had by a tribunal composed of nine mem-

bers appointed in the manner before mentioned, how can it be reasonably maintained that a decision (so called in the act) is not a decision at all, but merely a recommendation? This reminds one of the remark of Goldwin Smith in reference to Mr. Baron Parke "that with great ingenuity and all the power of a vigorous mind he reduced the law of England to an absurdity."

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NOTES OF IMPORTANT DECISIONS

REGULATION OF INSURANCE COMPANIES.—The Supreme Court of the United States, in National Union Fire Ins. Co. v. Wanberg, 43 Sup. Ct. 32, holds that a state may regulate the conduct by corporations of insurance as a business affected with a public interest, and that different conditions may be imposed foreign companies than on domestic. The Court upholds the validity of a statute of North Dakota providing that hail insurance shall take effect 24 hours after the application is taken by the authorized local agent, and that, if the company declines to write the insurance, it shall notify the applicant and the agent by telegram. This, the Court held, does not substitute mandatory obligation for freedom of contract, or deny the equal protection of the laws, and is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law, as in effect it forbids companies to engage in such business, unless they so extend the scope of authority of their local agents, or so speed communication between them and their authorized representatives, as to enable an applicant to know promptly whether he is protected, especially as the statute has been in force for some years, and has apparently not driven companies out of the business.

We quote at considerable length from the Court's opinion:

"The decision of this Court in German Alliance v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, settled the right of a state Legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest. This includes provision for 'unearned premium fund or reserve, the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, limitation of risks, and other regulations equally restrictive." 233 U. S. 412, 34 Sup. Ct. 619, 58 L. Ed. 1011, L. R. A. 1915C, 1189. It includes moreover the restrictions of defense to recovery on policies and the forbidding of stipulations to evade such restrictions. Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Whitfield v. Aetna Life Insurance Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895. But it is said the line of possible and valid regulation has here been passed by affirmatively imposing a contract on an insurance company before it has had a chance to consider the circumstances and decide that it wishes to make it; indeed, that it declares that to be an agreement with heavy obligation which is in fact no agreement at all. Thus it is argued that by this statute mandatory obligation is substituted for freedom of contract which is just that against which the Fourteenth Amendment was intended to secure persons. We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it. The statute treats the business of hail insurance as affected with a public interest. In that country, where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose. The danger and loss to be mitigated are possible for a short period. The storms are usually fitful, and may cover a comparatively small territory at a time, so that of two neighbors, one may have a total loss, and the other may escape altogether. The risk justifies a high rate of insurance. It differs so much in these and other respects from other insurance that it may properly call for special legislative treatment. The statutes apply to all companies engaged in such insurance. There is no discrimination, and no denial of the equal protection of the laws. The fact that the time requirements of the statute may bear more heavily on foreign companies whose principal offices may be far removed than upon those whose headquarters are within the state is a circumstance necessarily incident to their conduct of business in another state of which they

cannot complain. They cannot expect the laws of the state to be bent to accommodate them as a matter of strict legal right, however wise it may be for Legislatures to give weight to such a consideration in securing the use of their capital for their people. Moreover, as the business of such insurance companies is purely intrastate (New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332), the state has power to require them to accept conditions different from those imposed on domestic corporations (Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and cases cited), though this is not, of course, unlimited."

EMPLOYEE REMOVING SCRAP FROM INTERSTATE TRACKS, AND CUTTING GRASS ON OR NEAR TRACKS, AS ENGAGED IN INTERSTATE COMMERCE.—In Quirk v. Erie R. Co, 196 N. Y. Supp. 580, the Supreme Court of New York, Appellate Division, holds that a railroad employee removing scrap from tracks used by interstate trains is engaged in interstate commerce, while in cutting grass on or near interstate tracks he is not engaged in interstate comerce. In part the Court said:

"The sole question in the case is as to whether the claimant was engaged in interstate commerce at the time of his injury. The test is the nature of the work done at the time of injury. Was the work that was being done by the claimant interstate in its character, or so closely connected therewith as to be a part of it? Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; New York Cent. & H. R. R. Co. v. Carr, 238 U. S. 261, 35 Sup. Ct. 780, 59 L. Ed. 1298. So far as the claimant's work related to the prevention of the accumulation of ashes, cinders, coal, and scrap on the main track or the switch track, or so near to either as to endanger the safety of the operation of trains, or of those employed in such operation thereon, the character of the claimant's employment was so closely connected with interstate commerce as to be a part of it. To that extent his duties were interstate in character. So far as his duties related to the cutting of grass and weeds and the removal of the same, there is no testimony tending to indicate that such duties had any relation to the safety or the efficiency of the operation of trains, or had any relation to interstate commerce, or even intrastate commerce.

"The State Industrial Board was not obliged to believe that grass and weeds growing there could or would have any relation to the operation of trains. In fact, it seems to have been conceded that, so far as this phase of the claimant's work was concerned, it was for the purpose of beautifying the appearance of the yard, to make it look clean. If this was the sole thing that was being done by the claimant at the time of his injury, it seems clear that he was not engaged in interstate commerce. Plass v. Central New England R. Co., 226 N. Y. 449, 123 N. E. 852; Galveston H. & S. A. R. Co. v. Chojnacky (Tex. Civ. App.), 163 S. W. 1013.

"The claimant alone testifies as to just what he was doing at the moment of his accident. His testimony is not as clear as it might be in the differentiation between his two classes of employment, but so far as he seems to be specific in his answers the clear indication is that he was cutting and cleaning up grass. He testifies:

"'Q. What were you doing at the time it hit you? A. Cleaning up grass.'

"And again:

"'Q. Do you remember just what you were doing at that particular minute? A. Cutting grass and cleaning up, I think.'

"We think that there was some evidence to sustain the conclusion of the State Industrial Board that at the time of his injury the claimant was not engaged in interstate commerce."

SEPARATE TELEPHONE EXCHANGE AREAS FOR SUBURBS DISCRIMINATION.—Small municipalities and residence communities forming the suburbs of a large city, the inhabitants of which suburban communities have their social and commercial interests in the metropolitan center, cannot be said to have separate community interests, and where a telephone business has been built up to include such city and its suburbs, with free call service throughout the entire district, the telephone company may not thereafter separate the suburbs into separate exchange areas, and make toll charges for calls beyond the boundaries of each exchange area, and to do so amounts to unjust discrimination. City of Cincinnati v. Public Utilities Commission, 104 Ohio St. —, 137 N. E. 36.

PAPERS AS THE SUBJECT OF LARCENY

By Daniel M. Lyons*

At common law choses in action were not subjects of larceny, but have been generally made so by statute. The present discussion is not concerned with commercial paper or other instruments specifically included in such statutes, but is an inquiry into the history of criminal practice for the purpose of exposing the error of the view that has sometimes been taken that papers are not the subject of larceny at common law.

Although written instruments as such were not the subject of larceny, being of no intrinsic value and being evidence of property rather than property in possession or chattels, prosecutions at common law for theft of the paper on which such instruments were written were frequent. The reasoning underlying this distinction is outlined in Jolley v. U. S., 170 U. S. 406-7, citing U. S. v. Davis, 5 Mason 356, and various English cases.

It has been held that cancelled notes are valuable for the paper and stamps, as well as for their future use to the owner.[1]

Where the stealing of instruments constituting valid obligations is made indictable by statute, the taking of the paper itself has been held in some cases to be absorbed in the major offense and the government was held bound to describe the instrument and prove the charge as alleged.[2]

In Queen v. Powell it was held that a charge of intent to steal goods and chattels was not sustained by evidence of intent to steal mortgage deeds, though mortgage deeds were by statute the subject of larceny.

As a precaution, the practice has been adopted in some jurisdictions of adding a count at common law describing the subject of larceny as a piece of paper.[3]

The doctrine of distinction between the instrument and the paper has not, however, been followed to the extent that the mere intrinsic value of the paper is the determining consideration; the writing itself being an element of value great or little according to the contents. Thus in a prosecution for the larceny of copies of despatches taken from a government office in London, the Court said:

> "Such documents as these are clearly the subject of larceny, and inasmuch as the stealing of the paper itself would be a felony the fact of the paper being printed on makes no difference, and indeed this fact might in a great many instances materially increase the value."[4]

From these citations it is apparent then that the unlawful taking of papers may be indictable, even though the instruments written thereon are not such as are made the subject of larceny by statute, nor on the other hand is it necessary that the material upon which the instrument is written be of special or appreciable value.[5]

The possession of a paper is some evidence of its value to the owner. It does not lie in the mouth of one who deprives the owner of such a piece of property to say that the owner may not attach value to it, because the source or ground of the value is not apparent.

> "Many papers having no pecuniary value for others are of the greatest possible value to the owners and are property of a most important character."[6]

While it is not within the scope of the present article to discuss the constitutional provisions regarding search and seizure, and the decisions on that subject, it may not be amiss to observe at this point how well recognized is the notion of property in papers.

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(1) Rex v. Clarke, 2 Leach C. C. 1036.

(2) Queen v. Watts, 2 Den. C. C. 14; Queen v. Powell, 2 Den. C. C. 403; State v. Campbell, 103 N. C. 344.

(3) Commonwealth v. Brettun, 100 Mass. 206; Rex v. Vyse, 1 Moody 218.

(4) Rex v. Guernsey, 1 F. & F. 394.

(5) Commonwealth v. Cabot, 241 Mass. 131 and 140.

(6) Gouled v. U. S. 255 U. S. 298.

The Constitution of the United States provides in Article IV of the amendments:

"The right of the people to be secure in their persons, houses, *papers* and effects against unreasonable searches and seizures shall not be violated. * * *"

The Constitution of Massachusetts provides in the Declaration of Rights, Article XIV:

"Every subject has the right to be secure from all unreasonable searches and seizures of his person, his houses, his *papers* and all his possessions * * *"

Since the sovereign government itself is forbidden by the Constitution to take a citizen's papers without due process of law, it would be an anomalous situation if the taking of papers from the owner by an individual without legal sanction could not be prosecuted as a crime against property as readily as the larceny of other chattels not specifically named in the constitutional provision.

"Papers," says Lord Camden in Entick v. Carrington, 9 How. St. Tr. 1029, "are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the law of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us without such authority to pronounce a practice legal which would be subversive of all the comforts of society."

What evidence then of value is required in order to establish a case of larceny where the thing charged as stolen is a paper?

Proof of a particular value is not necessary. It is sufficient for conviction that the property alleged to be stolen shall be shown to be of some value, at least to the owner, if to no one else.[7]

In some instances the presentation of the stolen article to the jury is sufficient evidence from which they may draw a conclusion that the paper is of some value;[8] and in other cases a mere description of the paper without its production in court is sufficient.[9]

While the decisions in this country are numerous as to the constitutional protection of papers from unreasonable search and seizure, they were not specific as to the soundness of indictments for larceny of papers not included within statutory descriptions, until the case of Commonwealth v. Cabot was decided this year in the Massachusetts Supreme Court. In that case the papers in question were copies of original letters, a copy of a declaration in a suit, an unsigned paper purporting to be an affidavit, and a copy of a signed affidavit. All of these were held to be the subject of larceny, and the Court found in effect that if they were of value to the owner as he testified, it was not necessary for the Commonwealth to produce any evidence of an intrinsic value, although to be the subject of larceny they must have some vaule. At least one of the constitutional search and seizure cases here referred to was cited by the Court in its decision.

The tendency of such cases as there are in other jurisdictions is clearly along the same lines. The Cabot case may be taken as pronouncing the sound view of the criminal aspect of the unlawful taking of papers from the possession of their owner; and the decision will undoubtedly be followed in so far as it determines the law to be that papers which have been reduced to possession and are claimed as the property of any person are of value to him and need not be shown to have any value intrinsically or as commercial paper in order to be the subject of an indictment for larceny.

(7) Commonwealth v. Figgs, 14 Gray, 376.
(8) Commonwealth v. Burke, 12 Allen. 182.
(9) Commonwealth v. Lawless, 103 Mass. 429.

LYNCHING LEGISLATION

By Ralph Curtis Ringwalt*

Federal legislation to punish lynching may or may not be expedient. A good deal of weight may be given to the suggestion that lynching is sensibly, though slowly decreasing; that the homicidal mania prevails now in only a few States—63 per cent of the lynchings of the first six months of 1922 were in Texas and Mississippi; and that it is better to trust to awakening the consciences of these States than to thrust another burden on the federal judiciary. But that Congress may, if it sees fit, legislate to punish lynching does not seem doubtful.

The constitutional argument can be stated very simply. The Fourteenth Amendment provides that no State shall deny to any person the equal protection of the laws; and it also gives to Congress power to enforce this provision by appropriate legislation. Soon after the Amendment was passed, the Supreme Court decided that the inhibition was on State action and not on the action of individuals. As the Court said in the Civil Rights Cases, 109 U. S. 3, 11, "Individual invasion of individual rights is not the subject matter of the Amendment." Congress, therefore, cannot legislate affirmatively to secure to individuals the equal protection of the laws. It can only legislate to render nugatory State action which denies equal protection.

The question, therefore, whether Congress may legislate to punish lynching seems to present three points for consideration:

1. When does a State act?
2. What is it to deny the equal protection of the laws?
3. What is appropriate legislation?

1. The act of any officer clothed with power to act by a State is the act of the State.

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As the Court said in Louisville & N. R. Co. v. Bosworth, 230 Fed. 191, 206, "Literally speaking, a State cannot act at all. Those representing it as officers or agents alone can act." Furthermore, the act of any such representative is the act of the State. In the case of Home Telegraph & Telephone Co. v. Los Angeles, 227 U. S. 278, the syllabus says: "The provisions of the Fourteenth Amendment are generic in terms, and are addressed not only to the States, but to every person, whether natural or judicial, who is the repository of State power."

2. The equal protection of the laws requires the equal treatment of all persons and classes by each agency of the State in the exercise of its function.

Thus, in the case of Louisville & N. R. Co. v. Bosworth, cited above, the Court also said: "The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the State in the exercise of its particular function."

Again, in Yick Wo v. Hopkins, 118 U. S. 356, 373, it was said, "Though the law itself be fair on its face and impartial in its apearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Now, what are some of the facts with which Congress is confronted? The States provide agents whose duty it is to prosecute offenders. Yet in the 3,467 lynchings that have taken place in the United States since 1889, in less than a dozen cases, according to the Association for the Advancement of Colored People, have the guilty persons been prosecuted. Hence, when a State provides the means for, and does prosecute those who violate its laws, but

persistently fails to prosecute those who are guilty of mob murder, it would seem that persons, who, because of race, are especially in danger of mob violence, have been denied the equal protection of the laws. For, as Representative Volstead said in his speech on the Dyer bill in the House: "The punishment of crime is not so much for the correction of the guilty person as for the purpose of deterring others from committing like offenses. When a mob murder occurs and the perpetrators go unpunished, it makes certain that others will become victims of like outrages."

Again, it is the duty of States to, and States do provide for the protection of persons suspected of crime. Yet, over 75 per cent of all persons lynched in the United States, and 85 per cent of those lynched in the South have been negroes. In 1919, in 34 instances mob victims were taken from jails or officers. Hence, when a State provides for the protection of, and does protect persons suspected of crime, but persistently refuses to protect certain classes, notably colored persons and those charged with certain crimes, it seems clear that such persons have been denied the equal protection of the laws.

The only objection to this reasoning that need be considered maintains that a State cannot be said to act when an officer is guilty only of non-action; and especially when an officer, in not acting, fails to perform a duty expressly imposed by a State.

That negroes are in many States of the South denied equal protection by sheriffs and prosecutors cannot, of course, be denied. But it is said that the States cannot be charged with the mere failure of these officials to act. The argument, however, completely overlooks the fact that the State has acted and became responsible when it placed these officials in the position by reason of which they were able to withhold protection or prosecution.

This point was expressly considered in the case of Yick Wo v. Hopkins, cited above. In that case an officer who had the right to license laundries refused to license Chinamen; and it was held that the conviction of Yick Wo for operating a laundry without a license was void. In other words it was held that the failure to act was something with which the State could be charged.

Further, the objection that a State cannot be said to act when an officer in not acting fails to perform a duty imposed by the State, is met by the case of Home Telegraph & Telephone Co. v. Los Angeles, also cited above. In this case Los Angeles had passed a confiscatory ordinance, in violation of the Constitution of California. It was contended that the action of the city, as not within the limits of its authorization, was not State action. But the court held the contrary, and said, significantly, that the Fourteenth Amendment "provides for the case when one who is in the possession of State power uses that power to the doing of the wrongs that the Amendment forbids, even though the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the State authority lodged in the wrongdoer."

Can there be any question that the wrongs which the colored people in the South suffer are rendered possible by the State power lodged in the sheriffs and prosecutors?

3. How then may Congress legislate? Certainly, it would seem clear that Congress may punish officers who fail to afford reasonable protection for persons who may be threatened by mobs, and those who fail to prosecute persons participating in mobs. It would also seem clear that Congress may inflict a penalty on the county where a lynching occurs. Such penalties were upheld in Chicago v. Sturgis, 222 U. S. 313.

Whether Congress may punish the members of a mob, who take a suspected person from the custody of an officer, is perhaps more doubtful. But it can be contended with great force that Congress in the ex-

ercise of a constitutional power "may not only adopt means necessary, but convenient to its exercise, and the means may have the quality of a police regulation" (Hoke v. Unitel Stafes, 227 U. S. 308, 323); and that an appropriate and effective means of enforcing the constitutional guarantee is to punish all who have any part in its violation.

RELIEF OF TRUSTEES FROM BREACH OF TRUST

By Donald MacKay, Glasgow, Scotland

Last year a new Trust Act was passed consolidating and amending the law of Scotland. With regard to trustees this measure has been made the occasion for an interesting address by Lord Ashmore, one of the Scots Judges, in which he discuses the most important of the new clauses introduced into the Act, namely, Section 32, which relieves trustees from personal liability. In the following article we, with due acknowledgment, reproduce certain parts of his Lordship's address which has appeared in the principal legal journals. The section referred to is as follows:

"If it appears to the Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the Court may relieve the trustee either wholly or partly from personal liability for the same." A pertinent observation by his Lordship on this clause is that while the statutory introduction into Scottish law of the power of dispensation will no doubt provide practical means of alleviating the strictness of the law as hitherto administered, it does seem to offend against principle. The condition precedent of the right to the statutory relief is that there has been a breach of trust; but if a breach of trust has been committed and if loss results, it seems inequitable that there should be no remedy at law. While, therefore, the relief given to trustees from liability in the circumstances set forth in the statute is wholly satisfactory, the method of giving it cannot be regarded as well chosen.

Since 1893 the Courts in England have had similar dispensing power. It is too soon yet for cases to have occurred under the Scottish Act, and his Lordship therefore gave two illustrations showing how the relief under the English Act operated. He took first a case in which the Court relieved the trustees of liability—the case of Perrins v. Bellamy, [(1898) 2 Ch. 521, (1899) 1 Ch. 797)]—one of the earliest cases on the subject. In that case the trustees had committed a breach of trust by selling leaseholds which they had no power to realise, and thereby diminishing the income available to the liferentrix. The Court held that the trustees had brought themselves within the provisions of the Act, and accordingly relieved them from personal liability. As showing the importance attached to what was then a new judicial power he quoted some passages from the opinions of two of the distinguished Lord Justices who gave judgment in the Court of Appeal.

Lord Justice Lindley, after referring to the provision in the English Act of 1896 as "that extremely beneficial enactment," said:

> "Before 1896 the plaintiff, the liferentrix, would have succeeded in making these unfortunate trustees liable for the loss of income under the decisions then applicable to trustees—a very hard state of the law, and one which shocked one's sense of humanity and fairness."

Lord Justice Rigby also contrasted the position of trustees before and after the Act of 1896: "I remember well," said his Lordship, "in my early days cases in which, there having been inadvertent

breaches of trust involving no moral blame, the consequences were visited upon the trustees * * * and it shocked one's conscience. Now all that has been altered."

Then in the second place a case was instanced in which the English Court refused to relieve the trustees. In Shaw v. Cates, [(1909) 1 Ch. 389], the beneficiaries were suing the trustees to make good the loss sustained on a trust investment of £4,400. The loan had been made by the trustees on the security of freehold house property, and before agreeing to make the advance, the trustees had obtained a valuation. The same solicitors, however, acted both for the trustees and the borrower, and the valuer had been suggested by the borrower and was employed by the solicitors, although their letter instructing the valuer bore to be written by them on behalf of their clients, the trustees.

Now, in the English statute, as in the Scottish statute, it is enacted that no trustee lending money on property is to be chargeable with breach of duty by reason of the insufficiency of the security, provided he conforms to certain conditions prescribed in the statute, one of these being that in making the loan the trustees should have acted on a report made by a competent valuer "instructed and employed independently of any owner of the property."

In defense to the action it was pleaded for the trustees that, assuming that there had been a breach of trust on their part, they had acted honestly and reasonably and ought fairly to be excused. Mr. Justice Parker, however, held that they had not acted reasonably and were not entitled to the statutory relief. Moreover, in more than one case in England the rule has been laid down that where the breach of trust consists in investing the trust funds upon insufficient security the requirements of the statute law as to obtaining an independent valuation and as to observing the prescribed proportion of two-thirds of the value of the security constitute a *prima facie* standard by which reasonable conduct is to be judged.

Even with the new provision in the Trust Scotland Act of 1921 trustees in England had an important advantage not available to Scottish trustees and it is in this connection that his Lordship's observations are of special interest. In the first place, English trustees in cases of doubt as to what course they ought to adopt, can safeguard themselves by taking out what is called an Originating Summons, and in that way they obtain judicial guidance on any particular question arising in the administration of the trust. Moreover, the procedure referred to is simple and summary and inexpensive, and the trustees may be allowed expenses as between agent and client out of the trust estate.

Consider what an advantage and what a comfort this would prove to men and women who are desirous of doing their duty as trustees, but feel doubt as to how they ought to act and would like to be kept safe. They may have accepted office with no legal training and perhaps only a limited business experience, and they may have no proper appreciation of the nature and degree of the care and diligence which the law expects of them or of the particular risks and liabilities to which the law subjects them from start to finish.

Now, in Scotland the Court will not administer a trust and will not advise trustees on their administration. In the words of Lord President Inglis, trustees are not entitled to come to the Court for advice as to how they ought to exercise their powers. They must exercise their own discretion, and if they do so rightly they will be safe (Berwick, 1874, 2 R. 92; Noble's Trs., 1912, S. C. 1230; Dunbar's Trs., 1915, S. C. 860).

Yes; but the anxiety of the trustees is that although they do what they think best it may afterwards be held that they had exercised their discretion wrongly, and ac-

cordingly what trustees desire is judicial advice which will keep them safe. In many of the cases in which trustees have been held liable for breach of trust it appears that they had not expressly asked the advice of the trust solicitors and that no guidance or advice had been volunteered by the trust solicitors; while, in some cases, the trust solicitor had himself been personally implicated in the loss of the trust funds which the Court held the trustees liable to make good.

Indeed, trustees, if unfamiliar with the decisions of the Court, may perhaps, not unnaturally, consider that the trust solicitor, especially if he had acted for the truster in his lifetime, can be relied on spontaneously, on his own initiative, to advise the trustees and to keep them right —to see, for example, as regards investments, that when the trust funds are lent through them, the security is a proper trust security—to take care that the valuer is instructed independently of the borrower—to warn the trustees against yielding to the importunities of a liferenter and making speculative or hazardous loans to secure a high rate of interest—to advise that the trust funds, so far as not duly invested, must be kept pending investment in bank in name of the trustees, or otherwise safe and under their own control; and, as regards the distribution of the estate, to explain that before the trustees pay any of the beneficiaries, provision must be made not only for payment of all the ordinary creditors, but also for meeting the legal claims of the husband or wife and the children of the truster; and, generally, as regards all the varied details of trust administration, to stand by the trustees and to help them with all the profesional skill and experience he possesses and with all the care and caution which have been developed in him by the teaching of the Law Courts and the lessons of business life.

That sufficiently indicates the difficulties in which trustees may be placed in the course of their administration of a Scottish trust—difficulties which in England can be solved with ease and economy by securing judicial advice and guidance under an originating summons.

So far as regards this matter, however, the Act of 1921 leaves Scottish law and procedure as they were.

Another means of safeguarding trustees has been provided in England under the Judicial Trustees Act of 1896, and the relative Judicial Trustee Rules of 1897.

The statute provides for the appointment of judicial trustees on the application of a truster or intending truster, or of any trustee or any beneficiary; and as regards the trustees, any fit or proper person suggested in the application may be appointed, or if the Court is not satisfied of the fitness of the person suggested, then an official of the Court may be appointed.

The judicial trustee, if not an official of Court, must give security unless the Court dispenses with it; but any premium payable by a judicial trustee to guarantee his intromissions may be paid out of the trust estate if the Court so directs.

The whole procedure is of the simplest kind. The application is by originating summons in the Chancery Division or by petition in the County Court as regards trusts not exceeding £500 in value.

The judicial trustee may at any time request the Court to give him directions as to the trust administration by letter addressed to the officer of Court without any further formality, and the Court may give directions by letter signed by the officer also informally.

We have thus outlined Lord Ashmore's address in the hope that his contrast of the system of trust administration in England and Scotland may be of interest to American practitioners, perhaps suggesting some lines of amendment in their own laws or confirm the utility of improvements which they may have already made.

WILLS—ATTESTATION CLAUSE

DUNLAP v. DUNLAP

209 Pac. 651

Supreme Court of Okla., September 26, 1922

The fact that the attestation clause and signature of the witnesses to a will were on a separate sheet from the concluding provisions of the will and the testator's signature does not invalidate the will, where the sheets were originally fastened together in proper order, so that the attestation clause was upon the sheet immediately following that containing the end of the will.

C. Guy Cutlip, Tho. J. Horsley and J. A. Baker, all of Wewoka, for plaintiff in error.

J. Coody Johnson, D. G. Hart and J. A. Patterson, all of Wewoka, for defendant in error.

NICHOLSON, J. This case originated in the county court of Seminole County, and involves the will of James A. Dunlap, deceased. Soon after the death of James A. Dunlap, Izella Dunlap, his widow, filed for probate what purported to be his last will and testament. Thereupon Caroline Dunlap, the mother of the deceased, and one of the beneficiaries under the will, filed her protest and contest, praying that said will be not admitted to probate, the grounds thereof being that said purported will was not executed by said James A. Dunlap, but was a forgery; that said will was not witnessed by two subscribing witnesses, as required by law, and that James A. Dunlap was of unsound mind, and if said instrument was in fact executed by him, his signature was procured fraudulently and by overpersuasion and undue influence. The county court made an order admitting said will to probate, from which an appeal was taken to the district court, where, after a trial de novo. the judgment and order of the county court was affirmed, and the will admitted to probate. From which judgment the contestant has appealed to this court.

The contestant has abandoned the ground that James A. Dunlap was of unsound mind, but urges that the will was a forgery, and that it was not executed and witnessed as required by law. The trial court found that the instrument was executed by James A. Dunlap, and was not a forgery, and a careful examination of the record convinces us that this finding is not against the clear weight of the evidence, and, as this was purely a question of fact, such finding will not be disturbed.

This leaves for consideration the one question of whether or not the will was properly executed, witnessed and signed. It appears that the will, including the signature of the testator, was entirely written on one sheet of paper, and the attestation clause and signatures of the witnesses were on another sheet; that these two sheets were originally fastened together with a clipless fastener; that is, the fastener merely cut from the paper an oblong or tongue-like piece, which was by the machine forced through a narrow slit in the paper, thus binding the two sheets together. At the time of the trial, the two sheets were fastened together with metal staples, but it may be inferred that these staples were inserted after the will was executed.

Section 8348, Rev. Laws 1910, pertaining to the formal requisites of the execution of a will, provides that the will must be subscribed at the end thereof by the testator himself, or some person, in his presence and by his direction, must subscribe his name thereto, and there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will at the testator's request and in his presence.

(1) A substantial compliance with these requirements, including the requirement that the witnesses must sign at the end of the will, is essential to the validity of the will, and whether there has been a substantial compliance with the requirement as to the place of the signatures of the witnesses must necessarily be determined upon an inspection of the paper itself, assuming, as we must, in the absence of evidence to the contrary, that the instrument when signed by the witnesses was the same in its terms as when filed for probate.

The will was typewritten on a sheet of paper of ordinary legal cap size, the signature of the testator appearing immediately under the last line of the written matter in the will, and about 2½ inches from the bottom of the sheet. There was not sufficient space upon this sheet upon which to write the whole of the attestation clause; hence, this clause was written on a separate sheet and the sheets bound together, as above indicated. The attorney who drew the will identified it as the will written by him for the testator, and testified that he had written it in his office and delivered it to James A. Dunlap, who took it away with him; that in about three days it was returned to him through the mails signed and witnessed, and that he deposited it with either the county judge or the court clerk.

The only subscribing witness who testified at the trial in the district court identified the

will, and said that James A. Dunlap signed it and declared to her and the other witness that it was his will, and requested them to sign it as witnesses; this they did in his presense, their signatures appearing at the end of the attestation clause, which followed the last clause of the will and the testator's signature.

There is no statute forbidding the use of separate sheets of paper, or directing how they shall be fastened together, nor requiring that the signature of the subscribing witnesses be upon the same sheet as the signature of the testator. If the words of the will itself, with the signature of the testator had reached to the very bottom of the first sheet of paper, it could not reasonably be claimed that the fact that the attestation clause and signatures following on another page invalidated the will, or in any degree affected the question of the sufficiency of its execution.

(2) We conclude that the mere fact that the attestation clause and signatures of the witnesses are on a sheet or page following that on which the testator affixed his signature is immaterial. This conclusion is supported by In re Moro's Estate, 183 Cal. 29, 190 Pac. 168, 10 A. L. R. 422, wherein the Court, in construing Section 1276, Civil Code of California, which is identical with Section 8348, Rev. Laws 1910, held:

"The fact that the attestation clause was on a separate sheet from the concluding provisions of the will and the signature of testator, though there was a sufficient blank space on that sheet, does not invalidate the will, where the sheets were fastened together in proper order so that the attestation clause was upon the sheet immediately following that containing the end of the will."

(3, 4) In that case the will was written on three separate sheets of paper, which were fastened together by eyelets at the top, the body of the will ending about 3½ inches from the top of the second sheet, and the signature of the testator was placed immediately after this on a line left for that purpose. There was no other signature on the page; there being a blank space of about 8½ inches below the testator's signature. On the third sheet was written the attestation clause and the signature of the witnesses. There was sufficient space upon the page bearing the signature of the testator upon which to write the attestation clause and the signature of the witness, but the Court held that it was not necessary that such clause be written and the witnesses sign on that sheet, and that the will was executed in sub tantial compliance with the statute.

(5) Neither is the will invalid because the pages thereof were fastened together with a clipless fastener and became separated and were afterwards bound together with staples. The question is, Was the instrument as executed by the testator the same as that offered for probate? The county court and the district court on appeal found that it was, and their findings are not clearly against the weight of the evidence.

The will is not an unnatural one, and the fact that the testator left the bulk of his meager estate to his wife, instead of to his mother, is not sufficient to create even a suspicion of fraud or undue influence.

The judgment of the trial court is affirmed.

JOHNSON, KANE, McNEILL, MILLER and KENNAMER, JJ., concur.

NOTE—*Validity of Attestation Clause of Will on Separate Sheet of Paper.*—The fact that the attestation clause is on a separate sheet from the concluding provisions of the will and the signature of the testator, though there was a sufficient blank space on that sheet, does not invalidate the will, where the sheets are fastened together in proper order so that the attestation clause is upon the sheet immediately folowing that containing the end of the will. In re Moro's Estate, Cal., 190 Pac. 168.

Although the signature of one of the attesting witnesses to a will was on a sheet separate from the will, where it wes folded with the will and the two papers so folded delivered by the testator to a third person as his completed will, the will was sufficiently attested. The witnesses' signature need not be on the same sheet if the sheets are physically connected, and the folding of the two sheets together was sufficient. Bolton v. Bolton, 107 Miss., 84, 64 So. 967.

In Maryland, the witness to a will must sign on the same sheet of paper as the testator, or on a sheet physically attached thereto. This rule is not complied with by placing the will signed by the testatrix, and consisting of one sheet of paper, in an envelope, sealing it, and placing the attestation clause and signature of the witnesses on the outside of the envelope. Shane v. Wooley, Md., 113 Atl. 652.

WITHIN THE LAW

A salesman-like looking inspector stopped over night at a small town Kansas hotel and was surprised to find a dirty roller town in the washroom. Indignantly he said to the landlord:

Don't you know that it has been against the law for years to put up a roller towel in this State?"

"Sure, I know it", replied the proprietor, "but no ex post facto law goes in Kansas, and that there towel was put up before the law was passed."—Chicago Legal News.

BOOK REVIEWS

CORPUS JURIS, VOLUME 29

Volue 29 of Corpus Juris covers subjects from Habeas Corpus to Homicide, inclusive. On page V there is a complete list of titles contained in this volume. This is followed by a table of Words and Phrases, and Maxims. The reader's attention is called to the valuable service furnished its subscribers by Corpus Juris, as announced on the green sheet inserted in the first part of the volume. By applying by letter or wire to the Annual Annotations Bureau, 272 Flatbush Ave., Extension, Brooklyn, N. Y., giving volume, page and note number of Cyc or Corpus Juris, the subscriber to this work will receive (1) all citations of cases subsequent to the last volume of Annual Annotations free, by mail or wire according to request; (2) photographic copies of decisions by mail at prices given on said green sheet. This is service of great value, which subscribers by Cyc-Corpus Juris should not overlook.

PREPARING FOR TRIALS INVOLVING FORGERY

A valuable brochure entitled as above has been sent us by the author and publisher, Mr. Chauncey M'Govern, of San Francisco. The author says that the booklet really is a general answer to countless that have been asked him by lawyers having cases involving disputed documents. The author emphasizes the worthlesness of expert witneses who do not give clear, convincing, demonstrable reasons for their opinions.

The booklet contains the following entitled subdivisions:

Qualifying Handwriting Expert Witnesses, or Objecting to Their Qualifying in Court.

Legal Authorities on Testing Witnesses on Questioned Writing.

Citations on the Great Value of Handwriting Experts Who Make Ocular Demonstrations in Court of the Reasons for Their Opinions.

Pertinent Pointers as to Arguments for Attorneys in Trials Wherein Handwriting Experts Appear on Either Side.

Some Sample Recommendations Which Dependable Handwriting Experts Should be in Position to Show to Attorneys.

Negotiating to Engage Their Services.

TRADE REGULATION

A valuable addition to the working library is a volume entitled Cases on Trade Regulation, by Professor Herman Oliphant, of Columbia University, just sent us by the publishers, West Publishing Co.

The cases are selected from decisions of English and American courts, and the book is one of the American Casebook Series. The first of this series, Mikell's Cases on Criminal Law, was issued in December, 1908, and since then there have been published books on some thirty subjects.

In the preface to this work is made mention of a report of the United States Bureau of Education, published in 1914, which contained the following statements relative to the case method of teaching law:

"Today the case method forms the principle, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are, of course, still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is today the principle method of instruction in the great majority of the schoo's of this country."

The work, however, is valuable alike to student and practitioner. It is divided into three parts, which are appropriately divided into chapters. Part I treats of Contracts How to Compete; Part II, Competitive Practices; Part III, Combinations. An appendix contains the Sherman Anti-Trust Act; the Federal Trade Commission Act; the Clayton Act, and the Webb Act. There is also a very interesting and instructive Historical Introduction.

The work can be conscientiously and highly recommended.

Stranger (at Continental palace gates): "This is visitors' day, is it not?"

Attendant: "Yes, sir. Shall I show you round?"

Stranger: "Oh, don't trouble. I used to be King here once."—The Passing Show (London).

"Are you sure you can prove my client is crazy?"

"Why, certainly," replied the eminent alienist. "And what is more, if you are ever in trouble and need my services I'll do the same thing for you."—Birmingham Age-Herald.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Disbarment.—An attorney who appeared in propria persona at the hearing on June 29, 1922, of accusations filed June 6th by the bar association looking toward his disbarment under Code Civ. Proc. § 287, subd. 5, for commission of an act involving moral turpitude, following a hearing on January 24th of charges based on acts done about the middle of July, 1921, entered no dilatory pleas or motions, and made no objections, submitted himself as a witness against himself without objection, and testified that he would never again do such an act, suspended from the practice until January 1, 1923.—Bar Ass'n of San Francisco v. Devall, Calif., 210 Pac. 279.

2. **Automobiles**—Passengers.—A passenger in an automobile driven by another, while not bound to use the same care as the driver, is bound to use the same care for his own safety that a reasonably careful person would use under similar circumstances.—Wappler v. Schenck, Wis., 190 N. W. 555.

3. **Bankruptcy**—Exemption.—Alleged bankrupt owned a 400-acre farm, from which he had retired to town; the farm being operated as a stock farm by himself and a son, who resided thereon. Under the agreement the father was to personally assist in the work in busy seasons, which he did, the son was to furnish teams and his services, each was to furnish one-half the seed and stock, and each share in the management and equally in profits and losses. The father had no other business, but became indebted through indorsement of notes for another son, in whose business, however, he had no interest. Held, that he was engaged chiefly in farming, and under Bankruptcy Act, § 4 (Comp. St. § 9588), was exempt from involuntary adjudication in bankruptcy.—In Re Tyler, U. S. D. C., 284 Fed. 152.

4.——Jurisdiction.—A court of bankruptcy is without jurisdiction in an action by trustees in bankruptcy to set aside fraudulent purchases and transfers of property or to adjudge the purchaser's title good or fraudulent or to compel an accounting of collateral.—In Re Thompson, U. S. C. C. A., 284 Fed. 65.

5.——Liens.—The holder of an unrecorded mortgage or similar instrument, who has not taken possession before bankruptcy, cannot recover the mortgaged property in the possession of the trustee, even when the state statutes protect only subsequent lien creditors, and not subsequent simple contract creditors, from an unrecorded instrument, for under the bankruptcy statute from the filing of the petition the trustee stands in the shoes of a subsequent lien creditor without notice.—Industrial Finance Corporation v. Cappiemann, U. S. C. C. A., 284 Fed. 8.

6.——Trade-Name.—Under Bankruptcy Act, § 70(5), being Comp. St. § 9654, providing that property, which, prior to the filing of the petition, bankrupt could by any means have transferred shall pass to trustee, trustee secured title to the trade-name under which bankrupt conducted his business.—In Re Sawilowsky, U. S. D. C., 294 Fed. 158.

7.——Trustee.—Where maker of note assigned account to payee as collateral security, and payee in settlement thereof took back goods, the maker's trustee in bankruptcy on discovery of the transaction was required to repudiate or affirm it within a reasonable time.—American Exch. Bank v. Goetz, U. S. C. C. A., 283 Fed. 900.

8. **Banks and Banking**—Agency.—Where a telegraph company, acting in conformity with its tariff and working rules filed with and approved by the Interstate Commission under Act Cong. June 18, 1910 (U. S. Comp. St. § 8563), accepted money for transfer to a foreign country, and, because it had no agent there, turned the money over to a bank for transmission, the company became, according to its rules, the agent of the sender to the contract with the bank in his behalf, and the bank alone was liable to him for its negligence in failing to transmit the money; the bank as well as the sender being bound to know the rules prescribed.—Katz v. Western Union Telegraph Co. et al., N. Y., 196 N. Y. S. 556.

9.——False Reports.—In a prosecution of a bank officer for knowingly making a false report of his bank, under the last division of C. S. § 5276, it is not necessary to allege in the information that such report was made with the intent to deceive.—State v. Waterman, Idaho, 210 Pac. 208.

10.——Statute.—A certificate under section 598 of the General Statutes of 1915 should be issued by the bank commissioner to a depositor in a failed bank which had operated under sections 595-609 of the General Statutes of 1915, the State Bank Guaranty Act, where the depositor holds, or is entitled to, a time certificate of deposit bearing the rate of interest prescribed by the bank commissioner, and it is not shown that the bank was to pay or the depositor receive anything other than the certificate of deposit bearing the proper rate of interest, although it does appear that there was some contract between those negotiating the deposit, other than what appears on the face of the certificate.—Farmers' & Merchants' State Bank v. Foster, Kan., 210 Pac. 490.

11. **Bills and Notes**—Consideration.—A renewal note does not extinguish the debt represented by a note for which it is given in lieu unless there is a distinct and unqualified agreement that it shall so operate.—People's State Bank v. Penello, Calif., 210 Pac. 432.

12.——Title.—A negotiable promissory note must contain an agreement to pay a certain sum at a time and place named absolutely and at all events, and ordinarily any contemporaneous writing qualifying or modifying the absolutism of such terms constitutes an infirmity and disables the holder to confer a perfect title.—National Bank of Watervliet v. Martin, N. Y., 196 N. Y. S. 714.

13. **Carriers of Goods**—Liability.—Where the terminal carrier retains goods in its possession as a warehouseman, the initial carrier is not liable under the Carmack Amendment (U. S. Comp. St. §§ 8604a, 8604aa) for any subsequent loss or damage to the goods so held.—Efland Hosiery Mills v. Hines, N. C., 114 S. E. 472.

14. **Chattel Mortgages**—Foreclosure.—Where the holder of a chattel mortgage has secured possession of the mortgaged property and holds such possession for the purpose of foreclosure under C. S. § 6380 et seq., through the sheriff, and the

mortgage is valid as between the parties to it, a subsequent attaching creditor cannot defeat the foreclosure proceedings because of an insufficient affidavit, or by reason of the mortgage not having been recorded in that county.—Largilliere Co. v. McConkie, Idaho, 210 Pac. 207.

15. **Commerce**—Coal Cars.—The provision of Interstate Commerce Act, § 1 (12), as amended by Transportation Act of 1920, that every carrier shall count each and every car furnished to or used by any coal mine against such mine, does not determine the question of distribution, but must be read in connection with other language of the paragraph directing just and reasonable distribution of cars to coal mines, and also to maintain and apply just and reasonable ratings of such mines, and whether the method of distribution practiced by a carrier conforms to the statute is a question primarily for the Interstate Commerce Commission.—Cleveland & Western Coal Co. v. Baltimore & O. R. R. Co., U. S. D. C., 283 Fed. 995.

16——Federal Trade Commission.—Federal Trade Commision Act Sept. 26, 1914 (Comp. St. §§ 8836a-8836k), was enacted under the power conferred on Congress by the commerce clause of the Constitution, and the Commission has no authority in respect to intrastate commerce or transactions.—Federal Trade Commision v. P. Lorillard Co., U. S D. C., 283 Fed. 999.

17. **Constitutional Law**—Amendments.—Section 33 of the Constitution of 1890 delegates the legislative power to the Legislature, composed of a Senate and a House of Representatives. Section 273 of the Constitution of 1890 deals with the amending of the Constitution, and provides, among other things, that, when more than one amendment shall be submitted at one time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately. These sections deal with separate matters, and chapter 159, Laws 1916, violates section 273, because such act deals with several separate subjects, and was not submitted in such form as each might be voted on separately. State v. Brantley, 113 Miss. 786, 74 South. 662, Ann. Cas. 1917E, 723, overruled.—Power v. Robertson, Miss., 93 So. 769.

18.——Carriers.—Common carriers may be grouped in a special class, to secure proper discharge of their functions and to meet their liability for injuries inflicted on the public, and a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them, without denying due process of law or the equal protection of the laws, and this penalty or stimulus may be in the form of attorney's fees.—Chicago & N. W. Ry. Co. v. Nye-Schneider-Fowler Co., U. S. S. C., 53 Sup. Ct., 55.

19.——Married Woman Surety.—A married woman who entered into a suretyship contract when Burns' Ann. St. 1914, § 7855, making such contract voidable, was in effect could not avoid such contract after enactment of Acts 1919, c. 40, repealing such statute, without a saving clause, since the repeal of such statute did not impair any vested right conferred by statute; the statute having granted merely a privilege to avoid the contract constituting merely an inchoate right until exercised, which the Legislature had the right to withdraw at any time.—Parr v. Paynter, Ind., 137 N. E. 70.

20. **Contempt**—Inherent Right.—Though contempts are generally classified as "civil," which are those incident to the enforcement of judgments and decrees entered in furtherance of the remedy sought in litigation, or as "criminal," which are acts done or omitted in the presence of the court to interrupt its proceedings or lessen its dignity and authority, or out of the court's presence in disregard or abuse of its authority, there is no difference between the power of the court to administer punishment in the two classes or in the penalty that may be inflicted, which power does not depend upon constitutional or legislative grant, but is inherent in all courts.—People v. Peters, Ill., 137 N. E. 118.

21. **Corporations**—By-Law.—A by-law, ratified by the stockholders, providing that one or more directors may be removed without cause at a special meeting called for that purpose, by a vote of the stockholders holding two-thirds of the stock, is valid, and the court will not inquire into the validity of such a removal, especially where director removed voted in favor of ratifying this by-law.—In Re Schwartz, N. Y., 196 N. Y. S. 679.

22.——Estoppel.—Where a person has acted as stockholder, director and manager of a corporation for a long period of years, he is estopped, as against the corporation and its other officers and stockholders, to deny the regularity of the corporate organization.—Montoya v. Hubbell, N. M., 210 Pac. 227.

23.——Fraud.—Where a corporation has secured money of plaintiff by fraud, a plea of ultra vires is not admissible in an action to recover it.—Johnson v. Nebraska Bldg. & Inv. Co., Neb., 190 N. W., 590.

24.——Managing Agent.—To be a "managing agent," within Civil Practice Act, § 229, subd. 3, authorizing service on a managing resident agent in an action against a foreign corporatoin, an agent must be more than one who acts in an inferior or dependent capacity and under the control and direction of superior authority. He must be vested with some general powers which involve the exercise of independent judgment and discretion.—Appleby v. Insurance Office of Australia, N. Y., 196 N. Y. S. 575.

25.——Mortgage Foreclosure.—Where a foreign corporation takes a note at its banking house in another state, which note is secured by a chattel mortgage upon personal property in this state, and the entire transaction takes place at the banking house of the foreign corporation outside of the state, which is the place fixed for the payment of the note, a foreclosure of the mortgaged property within this state is not doing business in the state of Idaho within the meaning of article 11, § 10, of the Constitution, and C. S. § 4772.—Largilliere Co. v. McConkie, Idaho, 210 Pac. 207.

26.——Right to Inspect Books.—If stock in fact owned by employer is registered in name of agent, the agent, not being the real party in interest, would not be entitled to inspect the stock book and take extracts therefrom, under Burns' Ann. St. 1914, § 4054, entitling "stockholders" to inspect and take extracts from list of stockholders.—S. F. Bowser & Co. v. State, Ind., 137 N. E. 57.

27.——Service.—Where a foreign corporation had an office in New York City, with a clerical force and advertising manager, and eight salesmen engaged in soliciting advertising for a Chicago newspaper, was listed in the telephone directory, and also had a newspaper syndicate office, and a news bureau, it was "doing business in the state," so as to be amenable to the process of the New York courts.—Stollman v. Olmsted, N. Y., 196 N. Y. S. 689.

28. **Damages**—Measure.—Where employee was in the hospital more than six weeks, was confined to his house, and most of the time was in bed, for the greater part of two years, was suffering from neurasthenia at the time of the trial, caused by the injury, was earning $144 a month at the time of the accident, and had been unable to work for two years, he was entitled to recover the sum of $4,000.—Hoof v. Pacific American Fisheries, U. S. D. C., 284 Fed. 174.

29. **Electricity**—Trespasser.—Where the top girders of a bridge carrying a street over a railroad were 23 feet above the street, and fastened thereto were upright towers, posts, or struts, to which cross-arms supporting electric wires were attached six feet above their bases, there could be no recovery for injury to a boy climbing on such struts and coming in contact with the electric wires, in the absence of any evidence that the railroad company directly or by implication invited or licensed him to climb to a point from which he could touch the wire.—New York, N. H. & H. R. Co. v. Fauchter, U. S. S. C., 43 Sup. Ct. 38.

30.——Wire Poles.—Where electric wire poles are so erected as to interfere with the establishment of a joint driveway which adjoining owners desire to establish, the owners are entitled to

mandatory injunction requiring the removal of pole in one direction or the other so as to permit the establishment of such way. (Per Marshall, C. J., and Hough, J.).—Smith v. Central Power Co., Ohio, 137 N. E. 159.

31. **Executors and Administrators**—Resignation. —Under Code 1907, § 2692, requiring a resigning executor to file his accounts within one month after his resignation, that the World War was in progress, where the executor was not shown to have been absent on that account or the prevalence of the flu epidemic, with which the executor was not shown to have been afflicted, was no excuse for delay in the filing of his accounts.—Elmore v. Cunninghame, Ala., 93 So. 814.

32. **Frauds, Statute of**—Novation.—A board of county commissioners employed an attorney to sue a bond-broking firm for breach of a contract to purchase county bonds. The attorney's fee was specified to cover collection in full and also for cash settlement. The attorney performed services pursuant thereto. Afterwards negotiations looking to a settlement of the damage claim and for a revision of the contract, to purchase county bonds were begun, during all of which the defendant was fully advised that any settlement would have to include payment by defendant for the services of the attorney employed by the county. The defendant from all claims for damages for breach with the advice and acquiescence of the attorney, and upon the understanding of the county board that the defendant would pay the attorney's fee, the board made a new contract with defendant for the purchase of county bonds, and released the defendant from all claims for damages for breach of defendant's earlier contract to purchase bonds. Held, that defendant's oral promise to pay the attorney's fee was an original and independent promise whereby the defendant was substituted for the county board as plaintiff's debtor, and the county board was released from its obligation to plaintiff, and the defendant was released from the county's claim for damages, and that such transaction constituted a novation, and was not within the statute of frauds.—Smith v. Brown-Crummer Inv. Co., Kan., 210 Pac. 477.

33. **Fraudulent Conveyances**—Bulk Sales Law.—Buyer's failure to comply with Bulk Sales Law converts him into a trustee of the property bought, to the extent at least—of existing creditors of the seller at the time of the sale.—Harrison v. Riddell, Mont., 210 Pac. 460.

34. **Insurance**—Conditions Precedent.—Provisions as a condition precedent to an action against benefit association that "No member * * * shall resort to the civil courts * * * until such member * * * shall have exhausted all remedies in the tribunals of the order" and prescribing the requisite procedure in getting an adjustment before the "national judiciary" held unreasonable and contrary to public policy.—National Council, Junior Order of U. A. M. v. Hill, Ala., 93 So. 812.

35.——Exemption Clause.—An "acute" disease is one "attended with symptoms of some degree of severity and coming speedily to a crisis; opposed to chronic," and a chronic one is "continuing for a long time, lingering, habitual" and where the certificate of membership in an insurance society and the by-laws exempted it from liability if the insured died of malaria, and made it liable for only 10 per cent if one died of a chronic disease, an acute case of pellagra would not come within the liability exemption clause.—National Benev. Soc. v. Barker, Ark., 244 S. W. 720.

36.——Insurable Interest.—The plaintiff purchased a silo, and in payment gave the seller some cash and certain promissory notes. In the preliminary contract of sale there was a statement that all silos should remain the property of the seller until paid for, but no such recital was contained in the notes accepted in payment. Although several years had elapsed, full payment of the notes had not been made, but no claim of ownership of the silo had been asserted by the seller. Plaintiff procured insurance on the silo, and it was afterwards destroyed by tornado during the life of the policy. Held, that as the destruction of the property insured caused the plaintiff a direct pecuniary loss, he had an insurable interest in it, and was entitled to recover upon the policy.—Sturgeon v. Hanover Fire Ins. Co., Kan., 210 Pac. 342.

37. **Intoxicating Liquors**—Purchase Price Mortgage.—C. S. § 3403, authorizing sheriff to seize automobile used in illegal transportation of liquor, and providing for the forfeiture of the "right, title and interest" in the automobile of the person convicted of having possession of or transporting liquor in such automobile, held not to authorize forfeiture of the interest of sellers under purchase money mortgage on conviction of buyer, though mortgage was not recorded prior to seizure of automobile by sheriff.—South Georgia Motor Co. v. Jackson, N. C., 114 S. E. 478.

38. **Joint-Stock Companies and Business Trusts** —Removal of Trustees.—A court of equity can remove trustees on a proper showing of their fraud or unfitness, and this though the declaration of trust, by which the affairs of a joint-stock association were put in the hands of trustees, did not reserve to the shareholders the right to remove them.—Phoenix Oil Co. v. McLarren, Tex., 244 S. W. 830.

39. **Landlord and Tenant**—Right to Hold Over. —Under Rem. Code 1915, § 813, entitling tenant of agricultural land who has held over for more than 60 days after expiration of term "without any demand or notice to quit" by landlord or successor "to hold under the terms of the lease for another full year," a tenant who was not given notice to quit until four months after expiration of his term was entitled to hold over for another year, notwithstanding non-payment of rent due for the previous year.—Bushnell v. Spencer, Wash., 210 Pac. 195.

40. **Libel and Slander**—Cause of Action.—Where the substance of a publication alleged to be libelous under Code, § 5086, and its inferences, was that the county fair authorities had permitted a mild form of gambling which would forfeit state aid, and that loyalty required that no one should divulge such fact, and that plaintiff had divulged these facts to state authorities and interested himself in enforcing the forfeiture and that his conduct was disloyal and dishonorable to the community, the article published was not defamatory; all its vituperation being predicated on acts which plaintiff had a lawful right and even duty to do. —Fey v. King, Iowa, 190 N. W. 519.

41. **Master and Servant**—Independent Risk.— The testimony of the owner of an automobile that he was not present at the time of an accident, had not authorzied the use of the car by his son on that occasion, and did not even know it was out, that he had no business use for the car, and purchased and maintained it for the pleasure and convenience of his family, and that his son was accustomed to use the car at times for his sole pleasure at his own expense and was doing so on the occasion in question, when uncontradicted and sustained by other proof, overcame as matter of law the presumption that the car was being used for the benefit of the owner, as it was in accord with common experience and observation, and not improbable, surprising or suspicious.—Powers v. Wilson, N. Y., 196 N. Y. S. 600.

42.——Jurisdiction.—Though an admiralty court has jurisdiction of a tort action for personal injuries to a watchman on an unfinished launched vessel, the rule of right applicable, unless he bears the relation of a seaman as defined by Rev. St. § 4612 (Comp. St. § 8392), is the common-law right of recovery.—Hoof v. Pacific American Fisheries, U. S. D. C., 284 Fed. 174.

43. **Mines and Minerals**—Contract.—Where an oil and gas lease required the lessee to commence drilling to a certain depth within 60 days, and within one year to drill a well to a deep strata of oil, time was of the essence of the stipulation to drill the deep well and for the development of the property in general.—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., La., 93 So. 789.

44.——Forfeiture.—Where the holder of an oil and gas lease, requiring the drilling of a deep well within one year and providing for termination for failure to carry out any of the agreements thereof, failed to drill such well, and the lessor did nothing to mislead it into thinking that it might depart

from the contract, the fact that it spent large sums of money to develop the property did not estop the lessor from asserting a forfeiture.—Texala Oil & Gas Co. v. Caddo Mineral Lands Co., La., 93 So. 789.

45.——Lease.—A lease of land for twenty years to operate it for coal, containing no conditions of forfeiture or defeasance, and upon consideration of the royalties to be paid the lessor, will not be cancelled in equity and removed as a cloud on the lessor's title, when the lessee has the possession and has produced some coal and denies abandonment and affirms his intention to equip the mine and operate the property in compliance with the terms and provisions of the lease.—Vaughan v. Napier, W. Va., 114 S. E. 526.

46. **Monopolies**—Carriers.—Under the Anti-Trust Act, a combination of carriers to fix rates may be illegal, though the rates fixed are reasonable and non-discriminatory, and, if illegal, the government may have redress by criminal proceedings under section 3 (Comp. St. § 8822), by injunction under section 4 (Comp. St. § 8823), and by forfeiture under section 6 (Comp. St. § 8828).—Keogh v. Chicago & N. W. Ry. Co., U. S. S. C., 43 Sup. Ct. 47.

47. **Municipal Corporations**—Assessments.—Under Rev. St. 1908, § 5363, relating to the assessing of abutting property for the improvement of streets, and providing that "the sides of corner lots abutting on a street or alley so improved is to be regarded as frontage," the assessing of 25 feet of the side of a corner lot for the improvement of the street in front was unlawful, as the side of a corner lot is to be regarded as frontage upon the street on which it adjoins.—City of Ft. Collins v. Lee, Colo., 210 Pac. 322.

48.——Cause of Action.—Substantial compliance with the statutory requirements regarding notice of claims for injuries caused by the negligence of a municipality must be pleaded and proved as an essential part of the cause of action.—Rogers v. Village of Port Chester, N. Y., 137 N. E. 19.

49.——Evidence.—Where, in an action for death from being run down by an automobile truck, a ground of negligence relied on was that that the driver had lost control of the truck, evidence of the course and distance it ran after the collision was properly admitted, even though the speed of the truck was not in dispute.—Thomas v. Lockwood Oil Co., Wis., 190 N. W. 559.

50.——Notice.—Where the amusement chute on which plaintiff was injured had been erected by defendant, defendant had notice of its defective condition, as it was defendant's duty to use reasonable care to make the contrivance safe for the purpose for which it was to be used, and whether it did so was for the jury.—City of Ft. Collins v. Roten, Colo., 210 Pac. 326.

51.——Ordinance.—An ordinance which provides that no undertaking establishment shall be established or maintained within those parts of the city occupied mainly for residences is indefinite and uncertain, and therefore invalid.—Wasem v. City of Fargo, N. D., 190 N. W. 546.

52.——Traffic.—Where a truck driver, traveling north behind traffic moving slowly in the same direction, turned to the left on the south-bound trolley traffic to pass this traffic, there being no south-bound traffic at that time, and continued traveling north on the south-bound track, as other north-bound traffic and stationary vehicles prevented him from getting nearer the right curb, he did not violate Code of Ordinances of New York City, c. 24, art. 2, § 11, subds. 1, 3, requiring overtaking vehicles to pass on the left, and all other vehicles to keep to the right—People v. Smyth, N. Y., 196 N. Y. S. 561.

53. **Post Office**—Contract to Carry Mail.—Where bidders on a contract for carrying mails from a new post office, not ready for occupancy until long after the contract date, were led into making the bid and giving a bond by the assurance of the postmaster, to whom they were officially referred, as to the possible date of beginning the contract, and thus became bound to sign the contract before they were advised of the actual date, and though, when the contract was executed, the department intended to force on them a different and more burdensome route, it did not advise them thereof, or give them the exact schedule until shortly before they were to begin performance, their acceptance of the new route by performing the required work thereon held not to bar a recovery for what the services were reasonably worth.—Freund v. United States, U. S. S. C., 43 Sup. Ct. 70.

54. **Prize Fighting**—Instructions.—In a prosecution for engaging in a contention and fight without weapons and a sparring exhibition, for which an admission fee was charged, in violation of Laws 1899, p. 309, the court erred in refusing the people's instructions submitting the question whether it was a sparring exhibition or prize fight, and in giving instructions to acquit if the conditions of the proviso of such act were present, irrespective of the character of the contest, and requiring the people to prove the absence of such conditions.—People v. Shirley, Colo., 210 Pac. 327.

55. **Railroads**—Flagman.—That a brakeman flags a street crossing only for the train on which he is brakeman, his duty terminating when his train has passed the crossing, does not make him a flagman or watchman within the contemplation of the law requiring a railroad company to maintain a flagman or watchman at a street crossing.—Cisco & N. E. Ry. Co. v. Wood, Tex., 244 S. W. 834.

56.——Signals.—Though a path across railroad tracks at a depot used by the public for several years in going to and from the depot was not such a highway, street or traveled place as imposed on the railroad the duty of giving signals by bell or whistle, under Civ. Code 1912, § 3222, where it existed by its leave and license, the common-law duty of exercising due care to give reasonable signal of the train's approach was imposed on the company.—Chisolm v. Seaboard Air Line Ry., S. C., 114 S. E. 500.

57. **Release**—Fraud.—If negotiations resulting in a settlement of a claim for personal injuries to an employee were made between employer's doctor and the employee and statements regarding the nature of the injuries were made by the doctor to induce the employee to make the settlement, the employee is entitled to have the release set aside upon showing that the statements were false, that he believed them to be true and that he was induced by such belief to make the settlement, though the doctor did not make the statements at the time of the execution of the release, and believed them to be true when he made them.—St. Louis Southwestern Ry. Co. of Texas v. Thomas, Tex., 244 S. W. 839.

58. **Religious Societies**—Title to Property.—In the event of a division of a church congregation, the title to its property vests in that faction, whether the majority or minority, which continues to act in harmony with the laws, usages, and customs accepted by the body before the dispute arose.—Nagle v. Miller, Pa., 118, Al. 670.

59. **Sales**—Breach of Contract.—Where contract gave seller the right to fix the particular dates of shipment within specified periods, and seller on a particular date notified buyer that it claimed the right to make immediate shipments and asked for shipping directions, and on a subsequent date notified buyer that its failure to give shipping instructions within 48 hours would constitute a breach of the contract, the breach of the contract, as respects damages, occurred on the subsequent, and not on the prior, date.—La Grange Grocery Co. v. Lamborn & Co., U. S. C. C. A., 283 Fed. 869.

60.——Taxes.—Taxes on realty held not an indebtedness incurred "while managing or operating" a hotel within a covenant of the former lessees' bill of sale of the equipment to their successor that any "unpaid claims or bills" against them "while managing or operating" the hotel would be paid by them; such clause referring to liabilities arising out of the operation of the hotel.—Miller Hotel Co. v. Gorman, Iowa, 190 N. W. 524.

61. **Taxation**—Churches.—A church is a "purely public charity" within Ky. St. § 4281a1 et seq., providing that property bequeathed to a purely public charity shall be exempt from inheritance tax.—Sage's Ex'rs v. Commonwealth, Ky., 244 S. W. 779.